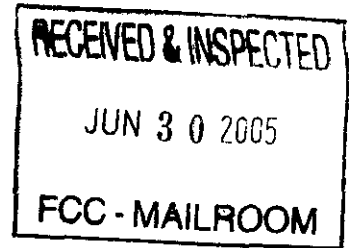


Before the
Federal Communications Commission
Washington, D.C. 20554



In the Matter of:

Amendment of Section 73.202(b),
FM Table of Allotments, FM Broadcast Stations
(Evergreen, Alabama and Shalimar, Florida)

MB Docket No. 04-219
RM-10986

TO: Marlene Dortch, Secretary
Attn: Audio Division

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OPPOSITION TO PETITION FOR RECONSIDERATION

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SUMMARY

In its Petition, Qantum seeks to litigate certain matters concerning compliance with the Multiple Ownership Rules which have no place in a rulemaking proceeding. These matters are more appropriately addressed in an application proceeding and, in fact, Qantum has addressed them in an application proceeding. They have no place here.

Qantum's argument that service will be lost to "underserved areas" is based upon a misunderstanding of what constitutes "underserved areas." Tested in light of the Commission's current Allocations Priorities, no underserved areas will be created.

Finally, Qantum's attack on Gulf Coast's *Tuck* showing is really an attack on the *Tuck* doctrine, itself. As such, it comes seventeen years too late.

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TO: Marlene Dortch, Secretary
Attn: Audio Division

OPPOSITION TO PETITION FOR RECONSIDERATION

Star Broadcasting, Inc. ("Star"), the successor in interest to Gulf Coast Broadcasting Company, Inc. ("Gulf Coast"), by its special counsel, respectfully opposes the Petition for Reconsideration (the "Petition") filed in this proceeding on May 10, 2005, by Qantum of Ft. Walton Beach License Company, LLC. ("Qantum"). In opposition thereto, it is alleged:¹

I. INTRODUCTION

1. In its Petition, Qantum makes essentially three arguments. First, it contends that the ownership of Station WPGG, Evergreen, Alabama, when transferred to Cumulus Licensing, LLC ("Cumulus"), will give Cumulus a "monopolistic" position in the Ft. Walton Beach, Florida market. Second, it contends that the modification of the license of Station WPGG to specify operation at Shalimar, Florida instead of Evergreen, Alabama will create "under-served areas." Finally, it attacks the independence of Shalimar, contending that the FCC staff either improperly applied the "*Tuck Doctrine*" or

¹ By Public Notice, published at 70 FR 34766-03, the FCC specified that Oppositions to the Petition must be filed by June 30, 2005. This Opposition is, therefore, timely.

that *Tuck*, itself, is somehow inadequate to protect the public interest. Each of these points will be answered herein, *seriatim*.

II. QANTUM'S CONCERN WITH THE COMPETITIVE EFFECTS OF THIS RULEMAKING ON THE FT. WALTON BEACH MARKET IS MISPLACED

2. In its Petition, Qantum argues that the relocation of Station WPGG from Evergreen, Alabama to Shalimar, Florida, coupled with the acquisition of that station by Cumulus, will have an anti-competitive effect on the Ft. Walton Beach, Florida market. That concern is entirely misplaced.

3. At one time, the Commission had a policy of "flagging" applications where it appeared that the acquisition of a station might have an anti-competitive effect. However, in *Definition of Radio Markets*, 18 FCC Rcd 13,620 (2003), the Commission announced that it had abandoned its "flagging" process and would, in the future, rely upon the revised market definitions set forth in its Multiple Ownership Rules (47 C. F. R. §73.3555) to "protect against harmful concentration levels in local radio markets." It said, in paragraph 301:

"But because of the problems associated with the contour-overlap market definition and counting methodologies, we could not rely with confidence on those numerical limits to protect against undue concentration in local markets. As a result, we began looking at revenue share in our "flagging" process and the interim policy that we established in the Local Radio Ownership NPRM. Now that we have established a rational system for defining radio markets and counting market participants, we believe that the numerical limits will be better able to protect against harmful concentration levels in the local radio markets that might otherwise threaten the public interest."

4. Thus, the only issue is whether, when Station WPGG is relocated from Evergreen, Alabama to Shalimar, Florida and acquired by Cumulus that acquisition will comply with the requirements of the Multiple Ownership Rules.

5. That is not an issue which is properly raised in this rulemaking proceeding. Rather, it is an issue which will arise when approval to assign the station's license to Cumulus is sought and should be addressed in that context, alone.

6. In the recent case of *Chillicothe, Hillsboro, and Marion, Ohio*, DA 05-764, released March 25, 2005 and reported at 2005 WL 696,774, the Audio Division ruled on a petition filed by Clear Channel to relocate on of its station from Marion, Ohio to Dublin, Ohio, in the Columbus, Ohio market. Opponents of the rulemaking pointed out that Clear Channel was already "maxed out" in the Columbus market, and could own no more stations there, without violating the multiple ownership rules. Nevertheless, the Audio Division approved the re-allotment. It held that the issue of compliance with the Multiple Ownership Rules cannot be raised in a rulemaking proceeding; that the issue must be raised, if it is raised at all, in the later application to implement the change of location of Clear Channel's station from Marion, Ohio to Dublin, Ohio. The same reasoning obviously applies here. The issue of whether Cumulus can comply with the Multiple Ownership Rules is a matter to be raised in connection with the application (File No. BALH-20050503AAW) for assignment of the WPGG license from Star Broadcasting, Inc. to Cumulus Licensing, Inc.² It may not be litigated in this rulemaking proceeding.

7. Nevertheless, we do not need to wonder whether Cumulus can comply with the Multiple Ownership Rules. In its application to acquire the ownership of Station WPGG (File No. BALH-20050503AAW), Cumulus has demonstrated that it may

² Quantum has, in fact, petitioned to deny that application, raising the issue of compliance with the Multiple Ownership Rules, and Star and Cumulus have responded. Thus, that issue is being litigated in connection with the transfer application, where it belongs. It does not belong in this rulemaking proceeding.

properly own Station WPGG at its current location in Evergreen, Alabama, without violating the Multiple Ownership Rules. See *Technical Statement*, attached to the application and marked Attachment 15. Additionally, Cumulus has shown that it can comply with the Multiple Ownership Rules, even if WPGG is moved to Shalimar, Florida. In Footnote 1 to the Technical Statement attached to the application, the Cumulus engineer states as follows:

“WPGG was recently ordered to change community of license and downgrade to Channel 227C2 at Shalimar, Florida. As of this writing, no application has been submitted to implement the change in community of license. When an application is submitted, it will contain an ownership analysis demonstrating compliance with the Commission’s rules. It is noted that Shalimar is located within a metro county of Fort Walton Beach, Florida Arbitron Market. Cumulus is presently the licensee of four FM stations and one AM station in that market. However, Cumulus is proposing, in separate applications, to divest itself of stations WNCV, Niceville, Florida and WYZB, May Esther, Florida. Cumulus is also proposing to acquire WTKE, Holt, Florida, which is also licensed to a metro county in the Fort Walton Beach market. Cumulus will control four FM stations and one AM station in the Fort Walton Beach market, which will be compliant under the rules based on the number of stations in the Fort Walton Beach market, once WPGG is relocated, Cumulus acquires WTKE and divests itself on WNCV and WYZB.”

**III. QANTUM’S ARGUMENTS CONCERNING THE ALLEGED
WITHDRAWAL OF RECEPTION SERVICE AND CREATION OF NEW
UNDERSERVED AREAS ARE WHOLLY WITHOUT MERIT.**

8. In its original Comments filed in this proceeding, Qantum alleged that as a result of the relocation of Station WPGG from Evergreen, Alabama to Shalimar, Florida, service would be withdrawn from 8,340 persons who would lose their fifth service and 722 persons who would lose their fourth service. To support its claim that these alleged losses were somehow significant, Qantum cited two ancient cases: *West Michigan*

Telecasters, Inc., 22 FCC 2d 943 (1970), *recon. denied*, 26 FCC 2d 668 (1970), *aff'd*, *West Michigan Telecasters, Inc.*, 460 F 2d 883 (D.C. Cir. 1972); and *Triangle Publications, Inc.*, 37 FCC 307, 3 RR 2d 37 (1964). Neither of these decisions has the slightest relevance, here.

9. *West Michigan Telecasters* was a case in which a television station in Grand Rapids, Michigan was attempting to move its transmitter site. The move created a short spacing. Hence, a waiver of the Commission's Rules was required. There is no waiver issue presented here. Furthermore, this case involves an FM allotment, not the relocation of a television transmitter site.

10. *Triangle Publications, Inc.* is equally inapposite. It also involved the relocation of the transmitter site of a television station, requiring a waiver of the Commission's Rules. Once again, there is no waiver issue here and the proposed re-allotment is governed by the Commission's FM policies, not by television policies.

11. In modern times, FM allocations have been made in accordance with FM Allotment Priorities, enunciated in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1988). Those priorities, recited in the staff's *Report and Order*, do not give any weight to third, fourth or fifth services. Thus, there was no reason for the staff to address Qantum's arguments, based upon third, fourth or fifth service.

**IV. QANTUM'S ATTACK ON GULF COAST'S TUCK SHOWING IS
REALLY AN ATTACK ON THE TUCK DOCTRINE, ITSELF; IT COMES
SEVENTEEN YEARS TOO LATE**

12. In its Petition, Qantum attacks Gulf Coast's *Tuck* showing. However, at page 7 of the Petition, Qantum makes a significant, left-handed admission. It says that, "Either . . . the Commission has misapplied the *Tuck* factor in this instance or that the

Tuck factors are simply not doing their job inasmuch as they are permitting licensees to gain the system to the detriment of rural listeners.”

13. Quantum says this because Quantum has been unable to show that the FCC staff erred in applying the eight *Tuck* factors. Quantum’s real argument is with the *Tuck* factor, itself. That argument, however, comes seventeen years too late.

14. The *Tuck* doctrine was adopted in the case of *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988) (“*Tuck*”). *Tuck* and the test based upon the eight factors established therein, have, therefore, been good law for seventeen years. During that time, the Commission has consistently applied the *Tuck* factors, just as they did in this case: analyzing the eight factors and concluding that a community is sufficiently separate from an urbanized area to justify new service, if a majority of the factors are satisfied.

15. Here, the FCC staff concluded that a majority of the factors were satisfied, in the case of Shalimar. Quantum has not shown otherwise. Its real argument is with *Tuck*, itself. But to the extent that it is attacking the *Tuck* doctrine, it is seventeen years too late.

V. WHILE QANTUM’S BASIC DISAGREEMENT IS WITH THE *TUCK* DOCTRINE ITSELF, QANTUM HAS ALSO FAILED TO SHOW THAT GULF COAST’S *TUCK* SHOWING WAS IN ANY WAY DEFICIENT

16. Gulf Coast’s pleadings in this proceeding presented conclusive evidence that the community of Shalimar satisfies the *Tuck* requirements and is therefore independent of the Fort Walton Beach, Florida Urbanized Area. This evidence was supported by an abundance of Commission and Bureau case law. Based on this case law and factual evidence, the Bureau concluded “that Shalimar is independent of the Fort

Walton Urbanized Area and entitled to a first local service.”³ Further, throughout this proceeding and in its Petition for Reconsideration, Qantum never disputes this factual evidence or the supporting case law demonstrating that Shalimar is independent of the Fort Walton Beach Urbanized Area. Rather, Qantum has consistently tried to distract the Commission by arguing in essence that because Shalimar is a small community it must be dependent on Fort Walton Beach. This argument lacks merit and does not dispute the ample evidence in this proceeding.

17. What is also significant about Qantum’s pleadings is that they acknowledge that Shalimar has the following factors that demonstrate independence: (i) an elected government that includes a mayor, town council, and town manager;⁴ (ii) a police department;⁵ (iii) a zip code and post office;⁶ (iv) two schools;⁷ (v) a fire department;⁸ (vi) a number of commercial establishments and businesses;⁹ (vii) a medical clinic;¹⁰ and (viii) a local bus service.¹¹

18. This evidence by itself demonstrates that Shalimar is independent of Fort Walton Beach. However, Gulf Coast submitted, and the Bureau accepted additional evidence demonstrating that Shalimar is independent of Fort Walton Beach. Specifically,

³ *Report and Order* at ¶ 7.

⁴ *Qantum Petition for Reconsideration* at p. 4.

⁵ *Id.*

⁶ *Id.* at p. 6.

⁷ *Qantum Reply Comments* at p. 8.

⁸ *Id.*

⁹ *Id.* at p. 9.

¹⁰ *Id.*

¹¹ *Id.*

Gulf Coast demonstrated that Shalimar satisfies the following *Tuck* factors for independence:

(1) *Shalimar Offers Substantial Employment Opportunities for its Residents and is not Dependent on Fort Walton Beach for Employment.* The Bureau found that, because the mean commuting time for Shalimar workers was 16.3 minutes, a significant number of Shalimar residents work in or very near Shalimar. This alone was enough to support a finding of independence.¹² However, as previously submitted by Gulf, there are a number of businesses in Shalimar that provide ample opportunities for the residents of Shalimar to work in Shalimar. See, e.g., *Lebanon and Speedway, Indiana*, 17 FCC Rcd 25064, at para. 4 (MB 2002) (the presence of many employers in the community alleviates any concern that the community is dependent on the urbanized area for employment of its residents); *Pleasanton, Bandera, Hondo, and Schertz, Texas*, 15 FCC Rcd 3068, at para. 9 (MMB 2000) (the presence of businesses sufficient to establish that residents work in the community); *Clovis and Madera, California*, 11 FCC Rcd 5219, at para. 19 (MMB 1996) (given the large number of businesses attributed to the community it is plausible that the community is capable of providing ample employment opportunities to its residents).

(2) *Community Leaders and Residents Perceive Shalimar as Independent of Fort Walton Beach.* The record contains a letter from the Town Manager demonstrating the widely held perception that Shalimar is an independent community. In addition, the Bureau recognized that Shalimar was incorporated in

¹² *Report and Order* at ¶ 8.

1944 and has a number of governmental employees. The Bureau found that this evidence was sufficient to demonstrate independence under this factor.¹³ Moreover, such evidence is consistent with other cases where the Bureau found independence. See, e.g., *Pleasanton, Bandera, Hondo, and Schertz, Texas*, *supra* (letter from city official sufficient to demonstrate independence); *Cadiz and Oak Grove Kentucky*, 10 FCC Rcd 10785, at para. 14 (MMB 1995); *app. for review dismissed*, 16 FCC Rcd 9556 (MB 2003) (letter from mayor and county judge executive sufficient to demonstrate independence); *D'Iberville and Wiggins, Mississippi*, 10 FCC Rcd 10796, at para. 5 (MMB 1995) (letter from mayor, and competitive athletics in the community, sufficient to demonstrate independence).

(3) *Shalimar's own Local Government is Independent of Fort Walton Beach's*. Quantum does not dispute the Bureau's finding that Shalimar has its own local government and elected officials. Rather, Quantum tries to penalize Shalimar for having a "part-time" government. Even if this were true, it does not disprove the fact that Shalimar has a local government that is independent of Fort Walton Beach. The record demonstrates that Shalimar's local government has a Mayor, four Commissioners, a Special Projects Commissioner, a Finance and Administration Commissioner, a Town Attorney, a Town Manager, a Deputy Town Clerk, a Police Chief, and a Maintenance Supervisor. The Bureau determined that this evidence was sufficient to support a finding of independence.¹⁴ This again is consistent with Bureau precedent. See, e.g., *Jupiter and Hobe Sound, Florida*, 12 FCC Rcd 3570, at para. 6 (MMB 1997)

¹³ *Id.* at ¶ 9.

¹⁴ *Id.* at ¶ 9.

(crediting the community of Hobe Sound with independence under this factor even though its “local” government was one member on a county Board of Commissioners); *Hallie and Ladysmith, Wisconsin*, 10 FCC Rcd 9257, at para. 6 (MMB 1995) (finding Hallie, Wisconsin, with a five person Board of Supervisors and a full time secretarial staff, to be independent). Further, Commission precedent suggests that local government has traditionally been the most important *Tuck* factor and only where a community lacks any form of local government will the Commission fail to find independence. See, e.g. *Detroit Lakes and Barnesville, Minnesota, and Enderlin, North Dakota*, 17 FCC Rcd 25055, at para. 11 (MB 2002); *Pleasanton, Bandera, Hondo, and Schertz, Texas*, *supra*.

(4) *Shalimar has its own Zip Code and Post Office Independent of Fort Walton Beach*. Quantum also does not expressly dispute the Bureau’s finding under the fifth *Tuck* factor for independence. Here, the record demonstrates that Shalimar has its own zip code and local post office, and the Bureau determined that was sufficient evidence to support a finding of independence.¹⁵ This finding again is consistent with Commission precedent. See, e.g., *Elizabeth City, North Carolina, and Chesapeake, Virginia*, 9 FCC Rcd 3586, at para. 20 (MMB 1994) (the existence of a zip code weighed against a finding of dependence).

(5) *Shalimar has its own Commercial Establishments, Health Facilities and Transportation*. The Bureau found that the presence of numerous local businesses, medical offices, and a local bus service demonstrate Shalimar’s

¹⁵ *Id.* at ¶ 9.

independence.¹⁶ Again, Qantum does not dispute this information, and again, this is consistent with Bureau precedent. *Farmersville, Texas, et al.*, 12 FCC Rcd 4099, at para. 6 (MMB 1997) (the Commission found Flower Mound to be independent as it possessed some local businesses, a library, twelve churches, a golf course, and parks); *Bon Air, Chester, Mechanicsville, Ruckersville, Williamsburg, and Fort Lee, Virginia*, 11 FCC Rcd 5758, at para. 11 (MMB 1996) (the Commission found Fort Lee to be independent as it possessed a medical clinic, a dental clinic, and a few local businesses).

(6) *Shalimar has its own police and fire protection, and its library and schools are independent of Fort Walton Beach.* The record demonstrates that Shalimar has its own police and fire department. Further, there are two schools located in Shalimar, and an independent library located just outside Shalimar. Traditionally, this would be enough to establish independence. See, *Headland, Alabama and Chattahoochee, Florida*, 10 FCC Rcd 10352, at para. 14 (MMB 1995) (community had police department, fire department, water works board, and schools); *Falmouth and Mashpee, Massachusetts*, 10 FCC Rcd 10445 ¶ 6 (Mass Med. Bur. 1995) (community had schools, library, a water system, police department and fire department); *D'Iberville and Wiggins, Mississippi, supra.* (community had schools, library, volunteer fire department, and police services provided by the county). However, here, the Bureau, found that this factor did not favor independence for Shalimar because some municipal services are not provided by the town of Shalimar. Gulf respectfully submits that the Bureau

¹⁶ *Id.* at ¶ 10.

erred under this factor. While Shalimar relies on Okaloosa County for a number of municipal services, this is not unusual for a small community and does not preclude a finding of independence. Further, it is significant that Shalimar relies on Okaloosa County, not Fort Walton Beach for municipal services.

19. Shalimar is clearly independent of Fort Walton Beach under *Tuck*. Quantum's arguments lack merit in light of the ample factual evidence and case law supporting Shalimar's independence. Therefore, the Bureau should uphold its decision that Shalimar is independent of Fort Walton Beach and deserving of a first local service.

VI. CONCLUSION

20. In short, none of the arguments advanced by Quantum have any merit, whatsoever. Its complaint regarding the *Tuck* showing is really a disagreement with the *Tuck* standards themselves, which have been in existence for seventeen years and applied, over and over, to determine whether a community has sufficient independence to justify a first local broadcast service. Quantum has failed to show that the staff misapplied the *Tuck* standards in this case.

21. Quantum's argument that the re-allotment from Evergreen to Shalimar creates "underserved areas" is predicated on Qatum's own unique definition of "underserved areas." Using the Commission's FM Allotment Priorities, there are no underserved areas.¹⁷

22. Finally, Quantum's arguments predicated on the Multiple Ownership Rules have no place in this rulemaking proceeding. Those arguments can be made in connection with the application by Cumulus to acquire the ownership of Station WPGG

¹⁷ The FM allotment priorities are: (1) First fulltime aural service; (2) Second fulltime aural service; (3) First local service; and (4) Other public interest matters. Co-equal weight is given to Priorities (2) and (3). *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1988).

but, based upon very recent and persuasive Commission precedent, those arguments do not belong in this rulemaking.

23. For the reasons set forth above, Quantum's Petition for Reconsideration must be summarily dismissed.

Respectfully submitted,

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June 28, 2005

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I, Kelli A. Muskett, a secretary in the law office of Lauren A. Colby, do hereby certify that copies of the foregoing have been sent via first class, U.S. mail, postage prepaid, this ^{29th}~~28th~~ day of June, 2005, to the offices of the following:

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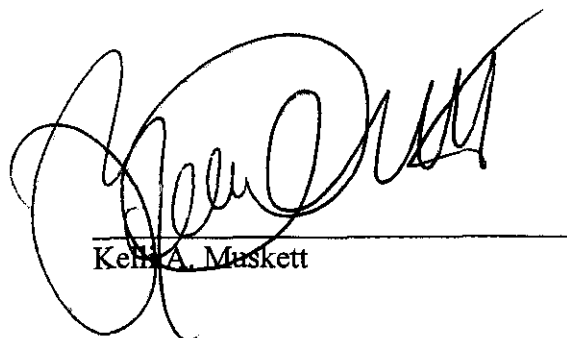
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